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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellants,

v.

THE BEER INSTITUTE, et al,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the Twenty-First Amendment sanction the State of Connecticut's Liquor Control Act including its affirmation provisions?

2. Are Connecticut's amended beer affirmation provisions constitutional under the Commerce Clause?

3. Did the Court of Appeals for The Second Circuit err in reversing the U.S. District Court for the District of Connecticut's September 15, 1987 decision which upheld the constitutionality of Connecticut's amended beer price affirmation provisions?

PARTIES

The parties in this action are as follows:

Appellants

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.

Appellees

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the States of Massachusetts, New York and Rhode Island:

Anheuser-Busch Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.

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The opinion of the United States Court of Appeals for the Second Circuit is reported in ____F.2d____ and a copy is attached hereto in Appendix A at page 1A. The earlier opinion of the United States District Court for the District of Connecticut is reported in 669 F. Supp. 543 and a copy is attached hereto in Appendix B at page 17A.

JURISDICTION

This case is an appeal from a Judgment of the United States Court of Appeals for the Second Circuit entered on June 13, 1988, which reversed the Ruling and Final Judgment of the United States District Court for the District of Connecticut dated September 15, 1987. A copy of the judgment of the District Court for the District of Connecticut is attached hereto in Appendix C at page 38A. The District Court had granted, pursuant to Fed.R.Civ. 56, Appellants' Motion for Summary Judgment, and had denied Appellees' Cross-Motion for Summary Judgment by holding that the Connecticut beer price affirmation provisions contained within the Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b) and 30-63c(b), do not violate the Commerce Clause of the United States Constitution, U.S. Const. Art. I, Section 8, cl 3.

On Appeal, the United States Court of Appeals for the Second Circuit reversed and remanded the matter on June 13, 1988, finding that the Connecticut beer price affirmation statute, on its face, violated the Commerce Clause of the United States Constitution. A Notice of Appeal was filed by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. in the U.S. Court of Appeals in New York, New York, on July 7, 1988. A copy of this Notice is attached hereto in Appendix D at page 39A.

The jurisdiction of the Supreme Court to hear this case on direct appeal rests upon 28 U.S.C. Sec. 1254 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const., Art. I, Sec. 8, cl. 3

THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., Amend. XXI, Sec. 2

THE BEER PRICE AFFIRMATION PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Con. Gen. Stat. Sec. 30-63a(b)[1]

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale,

---

[1] Conn. Gen. Stat. Section 30-63a(b) was ruled to be repealed by implication in a Declaratory Ruling by the Connecticut Department of Liquor Control. See *Healy II*, ____F.2d____, App. A, p. 6A.

shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63b(b)

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered at the time of posting by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "actual cost of delivery" shall mean those expenses incurred by such manufacturer or out-of-state shipper in delivering the item of beer to the wholesaler from the point of origin to the point of destination, the term "point of origin" shall mean the location which has been established through course of dealing as the geographic location from which the wholesaler has been charged by the manufacturer or out-of-state shipper for costs of transportation, notwithstanding the fact that the item of beer may have been manufactured or bottled at, or shipped from, a different geographic location, the term "point of destination" shall mean the location which has been established through course of dealing as the geographic location at which the wholesaler takes delivery of the item of beer, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits of each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes and

packages, approved by the Department of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63c(b)

THE PRICING PROVISIONS ALLOWING OUT-OF-STATE CHANGES:

This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

Conn. Gen. Stat. Section 30-63b(e)

THE POSTING PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery.

Conn. Gen. Stat. Section 30-63(c)

STATEMENT OF CASE

This case involves Appellees' fourth assault against certain price affirmation provisions of the State of Connecticut's Liquor Control Act. Appellees are collectively both a trade association now known as the Beer Institute (an industry-wide association of thirty-nine domestic brewers and twenty-three importers of beer, formerly the United States Brewers Association, Inc.), and individual brewers and importers, some of whom are licensed as out-of-state shippers to sell beer to wholesalers in the State of Connecticut. Appellants are Commissioners and the Secretary of the Connecticut Department of Liquor Control and the Wine & Spirits Wholesalers of Connecticut, Inc., an association of seven companies that are licensed to sell alcoholic liquor on a wholesale basis in the State of Connecticut.

The beer price affirmation provisions of the State of Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b), and 30-63c(b) were first enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. In 1984, the Connecticut General Assembly amended the State's beer price affirmation provisions in Public Acts 84-332 and 84-432. A copy of Public Acts 84-332 and 84-432 are attached hereto in Appendix E at page 42A. The declared purpose and ultimate result of Public Act 84-332 was to conform Connecticut's beer price affirmation provisions to the U.S. Supreme Court standard as enunciated in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 284 U.S. 35 (1966), and as modified by the U.S. Court of Appeals Second Circuit's decision in *U.S. Brewers Association v. Healy,* 692 F.2nd 275 (2d Cir. 1982), *affirmed per curiam,* 464 U.S. 909, (1983) (hereinafter, "*Healy I*").

Rather than requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute simply requires that at the time of posting the "prices charged to Connecticut wholesalers are *no higher than the lowest price then being charged in any border state.*" [emphasis added] *United States Brewers Association v. Healy* (hereinafter "*Healy II*"), 669 F. Supp. 543, 547 (D. Conn. 1987), *rev'd,* ____F.2d____ (2d Cir. 1988).

The Commissioners of Connecticut's Department of Liquor Control, by affidavit and Declaratory Ruling issued pursuant to Conn Gen. Stat. Section 4-176, have further restricted the State's beer affirmation provisions. The Ruling made clear that whatever the interpretation of Section 30-63a(b), out-of-state shippers, in this case brewers, need only affirm that at the time of posting in Connecticut (and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states. *See Healy II,* ____F.2d at ____; App. A at p. 6A.

The beer industry in Connecticut consists of three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. A participant at any of the levels must hold a valid Connecticut license to sell within the State alcoholic beverages to the tier below, and ultimately to the consumers. *Healy II,* 669 F. Supp. at 545-46.

Appellee licensees have contended that prices charged in package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets in Connecticut and its three bordering states. However, realistically in regard to interstate "competition," there is no appropriate vehicle for a wholesaler in one state to compete against a wholesaler in another state due to the nature of the national liquor distribution system under the Twenty-First Amendment and more particularly the three-tier system established independently by Connecticut and its three border states.

Moreover, Connecticut retailers, particularly near its borders, face substantial competition from retail beer outlets in the bordering states. Prices charged to Connecticut wholesalers are neither the highest nor the lowest in the four-state region. Nevertheless, as a result of higher wholesale prices, retail prices have been historically higher in Connecticut and many Connecticut residents have therefore purchased beer at lower retail prices by travelling to New York, Massachusetts or Rhode Island. *Healy II,* 669 F. Supp. at 546.

Beer sales in the states bordering Connecticut are regulated differently, although no less stringently, than those in

Connecticut. Although there has been no evidence or argument in any of the three proceedings previously brought by Appellees relative to the comparative stringency of liquor laws in Connecticut as opposed to its bordering states, there are certain provisions in the border states that are considerably more stringent than similar provisions in Connecticut.

The fact that those licensees who choose to do business in any of the fifty states under the Twenty-First Amendment must conform to the criteria established to become a licensee in each state is the backdrop against which this litigation has proceeded. Connecticut's affirmation provisions are significantly less restrictive than those in so-called "control states" where the state is in charge of importation, wholesaling, establishment of prices and distribution. Moreover, the sale of alcoholic liquors under the Twenty-First Amendment is a privilege and not a right. *See Hostetter v. Idlewild Liquor Corp.* (hereinafter "*Hostetter*"), 377 U.S. 324, 330 (1964).

On July 25, 1984, Appellees filed a challenge in the United States District Court for the District of Connecticut to contest certain provisions of Connecticut's Liquor Control Act as revised by the state legislature in accordance with the decision in *Healy I.* In their complaint, Appellees alleged that the statute violated the Commerce Clause.

On August 30, 1984, Appellants answered and filed a Motion for Summary Judgment, noting that the revised Connecticut statute was drafted in accordance with the decision of the District Court of Appeals in *Healy I.*

Appellees opposed Appellants' Motion For Summary Judgment and filed a Cross-Motion For Summary Judgment on February 13, 1985.

On September 19, 1984, the Wine & Spirits Wholesalers of Connecticut, Inc., filed a motion to intervene in the District Court action, based on the fact that the beer price affirmation provisions challenged by the Appellees were substantially similar in language and effect to Connecticut's affirmation

provisions pertaining to alcohol and spirits. Said motion to intervene was granted and subsequently on February 13, 1985, Intervenor-Appellants filed a memorandum in support of Appellants' Motion for Summary Judgment.

On September 11, 1987, the District Court granted Appellants' Motion for Summary Judgment and denied Appellees' Motion for Summary Judgment. Appellees filed a notice of appeal on October 13, 1987.

On June 13, 1988, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court. A Notice Of Appeal was filed by Appellants John F. Healy, et al on June 29, 1988 and by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. on July 7, 1988.

THE QUESTIONS ARE SUBSTANTIAL

For the following reasons, Appellants, Wine & Spirits Wholesalers of Connecticut, Inc., respectfully submit that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

I. THE TWENTY-FIRST AMENDMENT SANCTIONS CONNECTICUT'S LIQUOR CONTROL ACT INCLUDING ITS AFFIRMATION PROVISIONS.

The second section of the Twenty-First Amendment provides that "the transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Twenty-First Amendment makes the sale of liquor in any state a privilege bestowed by the state. A state may even completely prohibit the sale and consumption of alcoholic beverages within its borders. Moreover, such a prohibition would not violate the Commerce Clause. *Hostetter* at 330.

Furthermore, the Court has stated that it is well established that a state has broad power under the Twenty-First Amendment "to regulate the times, places and circumstances under which liquor may be sold", *New York State Liquor Authority v. Bilanca*, 452 U.S. 714 (1981); *See also Duran v. Salem, Inc.*, 422 U.S. 911 (1975); *Zifferin, Inc. v. Rives*, 308 U.S. 132 (1939); *California v. LaReau*, 409 U.S. 109 (1972). Furthermore, as the Supreme Court observed in *Craig v. Boren*, 429 U.S. 190 (1976), "this court's decision . . . (has) confirmed that the (Twenty-First Amendment) primarily created an exception to the normal operation of the Commerce Clause," *Id.* at 206.

As noted in the District Court's decision, Section 2 of the Twenty-First Amendment "grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Healy II*, 669 F. Supp. at 549; *See also California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Thus, as the District Court correctly concluded, because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulations are within a state's authority, *Id.; See also State Board of Equalization v. Young's Market Company*, 299 U.S. 59, 62-63 (1936), although under traditional Commerce Clause limitations it could not ban the sale of other products; *See Baldwin v. G.A.F. Seelig, Inc.* (hereinafter "*Seelig*"), 294 U.S. 511 (1935), likewise it would not necessarily be free to impose similar restrictions with respect to milk. *Healy II*, 669 F. Supp. at 599; *See also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

Since its adoption, the Twenty-First Amendment has remained the governing force in granting states the right to regulate the sale of liquor within their borders. As recently as September, 1984, Judge Friendly of the Second Circuit noted:

> "for some of us who were present at the creation" of the Twenty-First Amendment . . . the Twenty-First Amendment was designed to end the "noble experiment" by which the federal government endeavored to control the drinking habits of all citizens and place

> control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by Section 1, the Amendment gives the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had hampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by Section 2 of the Twenty-First Amendment which provides: "the transportation or importation in any state, territory or possession of the United States for delivery of use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority, No. 84-7168 (2d Cir. 1984).

In summary, as the District Court correctly concluded, in relation to the Twenty-First Amendment and the Commerce Clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Healy II*, 669 F. Supp. at 550, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority* (hereinafter "*Brown-Forman*"), 476 U.S. 573, 106 S. Ct. 2080, 2084 (1986), quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *See also Midcal* at 109 (what is required in this area is a pragmatic effort to harmonize state and federal powers).

Appellees maintain that the Twenty-First Amendment does not authorize the states to interfere with commerce in other states. As the District Court correctly found, and as discussed herein, Connecticut's affirmation statute does not in any way interfere with commerce in other states. Appellees' claims to the contrary are spurious. Thus notwithstanding Appellees' wishes to the contrary, the Twenty-First Amendment has a direct bearing in affirming the constitutionality of Connecticut's beer affirmation statute. The Twenty-First Amendment cannot be argued away.

II. CONNECTICUT'S AMENDED BEER AFFIRMATION STATUTE IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE.

A. Presumption Of Validity Relative To Connecticut's Amended Beer Affirmation Statute.

In contemplating whether a statute, such as Connecticut's beer affirmation statute, is constitutional, legislation is presumed constitutional unless clearly shown not to be so. *Healy II*, 669 F. Supp. at 548-549.

As the District Court correctly concluded, judges should not, in the exercise of the judicial function, undertake to second guess the political judgment of legislatures. Thus, the District Court held that judges *must* [emphasis added] refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *Id.*

In a great volume of cases, the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. *Hodel v. Indiana*, 101 S.Ct. 2376 (1980). Moreover, every reasonable presumption must be indulged in favor of the validity of an Act. *Home Tel. & Tel. Co. v. Los Angeles*, 211 U.S. 265 (1980).

A fundamental consequence of a presumption in favor of the validity of legislative acts and the duty of the court to resolve all doubts in favor of their validity is that the party alleging the unconstitutionality of a statute has the burden of proof. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946). Appellees have failed to carry their burden of proof and overcome the presumption of validity relative to Connecticut's amended statute.

B. Connecticut's Beer Affirmation Is Facially Valid.

In *Brown-Forman*, Justice Marshall suggested that the Court "has adopted what amounts to a two-tiered approach

to analyzing state economic legislation under the Commerce Clause," 106 S.Ct. at 2084. Under the two-tier criteria established under *Pike v. Bruce Church, Inc.,* (hereinafter "Pike"), 397 U.S. 137, 142 (1970), the 'per se' invalid tier involved a state statute that directly regulated or discriminated against interstate commerce or in effect favored in-state economic interests over out-of-state economic interests. This kind of statute would be struck down 'per se' without further inquiry. *Id.*

The District Court applied the 'per se' standard enunciated in *Brown-Forman* to Connecticut's affirmation statute and correctly found that the statute did not directly regulate or discriminate against interstate commerce. *Healy II,* 669 F. Supp. at 553. Under the current Connecticut law, shippers must post their price schedule, hold it for the next full month, and affirm that the price, *at the time of posting* [emphasis added], is no higher than the lowest price offered to wholesalers in other states bordering Connecticut. Conn. Gen. Stat. Section 30-63b(b). Since posting occurs at a precise moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way inhibit price changes by out-of-state shippers at any time. Moreover, Conn. Gen. Stat. Section 36-63b(e) specifically provides:

> This section (affirmation) shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any such time during the calendar month covered by such posting.

Clearly a price change by a shipper in another state cannot constitute a violation of Connecticut law. This eliminates the Appellees' argument that Connecticut law facially manifests an impermissible extraterritorial effect as further discussed in Section III. B, herein. Indeed, at one time, Appellees in the pending case withdrew their argument on this point. *Healy II,* ____F.2d____, App. A at p. 6A.

Moreover, there is no possibility that Connecticut's affirmation law regulates prices in other states. This is in contrast to the court's finding that the New York ABC law, struck down in *Brown-Forman*, had an overall effect to directly regulate prices in other states.

For instance, if the lowest price for a case of X brand beer in New York, Rhode Island, and Massachusetts is $10.00 at 10:00 a.m. on January 6 (time of posting in Connecticut; See 7 REG. CONN. AGENCIES, LIQ. CONT. SEC. 30-6-B4a, a copy of which is attached hereto as Appendix F at p. 53A), then the price for that same item in Connecticut must be affirmed at $10.00 or less under Connecticut law. If at any time subsequent to that posting, the price of a case of X brand beer is changed to $9.00 in one of the border states, Connecticut law is not violated, nor does it prevent such a price change.

Appellees maintain that Connecticut law prevents brewers from changing their prices in Massachusetts, New York and Rhode Island. It is not Connecticut law that prevents a price change, although there may be restrictive laws within other states which prevent such changes.

As the District Court correctly concluded "under *Seagram*, Connecticut's affirmation statute is facially valid" because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. *Healy II*, 669 F. Supp. at 553.

Connecticut's beer affirmation law also does not discriminate in favoring in-state economic interests over out-of-state interests. Connecticut's Posting and Affirmation statutes are designed in such a way that the wholesaler, retailer and consumer pay prices that are fair and competitive with their counterparts in border states. Furthermore, Connecticut's law does not protect in-state industry at the expense of out-of-state industry, because Connecticut has no in-state brewers. Cf. *Seelig*.

Connecticut's legislation treats all brewers equally, so that no particular brewer, and no one particular state, is disproportionately affected by these statutes. Connecticut simply places upon all brewers desiring to sell their products in Connecticut a uniform element of market price competition. The state's beer affirmation statute is therefore facially valid.

C. Under *Seagram*, Connecticut's Beer Affirmation Statute Is Constitutional.

In *Seagram*, 284 U.S. 35 (1966), the Supreme Court upheld the constitutionality of a New York posting and affirmation statute far more restrictive than the statute at issue. The New York statute in that case required that the monthly price schedules for sales to wholesalers and retailers, as filed with the New York State Liquor Authority, be accompanied by an affirmation that "the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. *Seagram* at 39-40.

In upholding the constitutionality of the New York law, the Court noted that the case concerned liquor "destined for use, distribution, or consumption in the state of New York," *Id.* at 42. The Court held that "the Twenty-First Amendment demands wide *latitude* [emphasis added] for regulation by the state." *Id.*

The Court reasoned that New York could "constitutionally insist" that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43. Holding for the state, the Court added that the Appellant's argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids." *Id.* at 43.

Seagram has never been overruled and is both stare decisis and the dispositive statement on state liquor affirmation provisions. If it has been somewhat modified by the Supreme Court in *Brown-Forman*, said modifications have no effect on the constitutionality of the Connecticut affirmation statute under the strict limitations set forth therein.

D. Under A Balancing Approach, Connecticut's Beer Affirmation Statute Is Constitutional In That It Places Only Incidental And Indirect Burdens On Interstate Commerce.

The District Court also correctly found that, in addition to being facially valid, Connecticut's beer affirmation statute passed muster under the second prong of the *Pike* two-tier standard enunciated in *Brown-Forman*, namely "the critical consideration—under either test, is the overall effect of the statute on both local and interstate activity". *Brown-Forman*, 106 S.Ct. at 2084.

The District Court correctly discounted the Appellees' assertions that some business of Connecticut residents previously going to border state retailers would shift to Connecticut retailers and found that "some artificially" high prices (in the border states) and/or "artificially" low prices that result in Connecticut from beer price affirmation would not render the statute unconstitutional. In fact, quite to the contrary, the District Court noted that the Supreme Court has held that a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43; *Healy II*, 669 F. Supp. at 553.

The District Court found that a "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from predominantly out-of-state industry to a predominantly in-state industry," *Healy II*, 669 F. Supp. at 553, quoting

Minnesota v. Cloverleaf Creamery Company, 449 U.S. 456 (1981). In effect, the District Court found that the disincentive to Connecticut consumers to buy outside the state (not shown to be of more than minor economic significance) and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut, are not excessive burdens or intrusions on commerce, *Healy II*, 669 F. Supp. at 553. Finally, the District Court held that "because Connecticut's statute operates even-handedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits." *Id.*

E. Connecticut Maintains A Legitimate State Interest Underscored By Its Licensing Apparatus In Regulating The Distribution Of Alcohol Within Its Borders.

Despite voluminous litigation involving Connecticut's Liquor Control Act, Appellees have never provided reasoning as to why prices should be substantially lower in three border states than in Connecticut, or conversely, why they should be much higher in Connecticut than in the border states. Connecticut maintains a plethora of legitimate state interests to regulate importation, distribution and sale of alcoholic liquor within its boundaries, not the least of which is insuring that Connecticut wholesalers and retailers be treated equally by receiving the same prices as their neighbors across state lines. Because the Connecticut law allows brewers to reflect additional shipping and tax costs in determining the affirmed price, there is no valid reason why brewers should charge more in Connecticut than in its three border states.

Connecticut does not seek to dictate the prices at which the brewers offer their products. Connecticut is simply insisting that its wholesalers be placed on an equal footing with wholesalers in the border states, and that they not be singled out to subsidize lower prices charged by brewers in these

border states. This is similar to the mandate which seventeen states with state-run liquor retail operations have given to national liquor distillers and importers, *See Seagram, supra.*

It is fundamental economics that if brewers charge artificially low prices in some states, they will charge comparably higher prices in other states in order to achieve targeted profit margins. Acknowledging this inevitable market price discrimination, Connecticut has sought only to insure that its consumers will not be subsidizing the lower prices being charged to consumers in bordering states.

Moreover, Connecticut has a legitimate state interest in maximizing sales within its own borders in order to increase its tax revenue. Increasing state revenue is particularly important in Connecticut, where there is no state income tax, and the state must rely on a sales tax, and on such taxes as those imposed on alcohol, to fund the state budget. Furthermore, highway safety must be considered a unique factor with regards to traveling across state lines to purchase intoxicating alcohol. The state has a legitimate interest in trying to curtail buying patterns that could lead to increased danger on the highways.

There are some state activities which have been held invalid under the Commerce Clause. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), the State of New Jersey attempted to prevent out-of-state shippers from depositing their garbage in New Jersey landfills, while granting the New Jersey sources of garbage preferential treatment in being admitted to their landfill sites. In order to adjudge a state law infirm under the Commerce Clause, the Court stated that "what is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628.

Connecticut's affirmation law does not isolate Connecticut from its border states, but rather insures that the state is treated in harmony with those states and that Connecticut is

not "isolated" in paying higher prices to subsidize prices charged in the border states. In a similar vein, the Connecticut legislature solely seeks to have its wholesalers, retailers and consumers treated in parity with their counterparts in its neighboring states.

In short, the Commerce Clause does not prohibit a state from enacting reasonable legislation to protect the economic interests of its citizens, even if such legislation incidentally affects interstate commerce:

> Where the statute regulates evenhandedly to effectuate a ligitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 624, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

F. The Connecticut Affirmation Statute Promotes Commerce Clause Principles By Eliminating Arbitrary Price Discrimination.

The Twenty-First Amendment has established a national liquor distribution system whereby each state regulates the distribution of alcoholic liquors within its borders. Accordingly, each manufacturer of intoxicating liquor, or in this case brewer or importer, has to choose to apply for and be approved to receive and maintain a license, or as it is sometimes called, a permit, from the states, in which it wishes to operate.

Within this context, a liquor license cannot be considered a contract between the government and the licensee within the

protection of constitutional guarantees, but rather a privilege which may be revoked at any time. *See Hostetter* at 324. Moreover, where an application has been made to the state for a license to sell alcoholic liquors, the statutory rules, regulations, terms and conditions under which such liquors may be sold become binding obligations between the state and the licensee. Thus, those appellees who choose to do business in Connecticut are bound by Connecticut's beer affirmation statute so long as they apply for, are granted, and accept licenses from the state under the terms and conditions outlined by the state. Licensees must also comply with both federal and state standards to maintain their licenses.

There is, therefore, no constitutional right to engage in the sale of alcoholic liquors, and alcoholic liquors are clearly distinguishable from other consumer products, such as milk.

Moreover, markets and distribution channels involving alcoholic liquors are heavily regulated and to a great extent protected through a state-by-state licensing system. Unlike other industries, an upstart brewer/importer could not simply begin operation by manufacturing and distributing its products in the United States without first applying to and being approved by appropriate state and federal regulatory authorities. Thus, there are market entry barriers resulting from the licensing system which serve to artificially protect industry-wide giants, such as many of the appellees in this action, from competition.

Furthermore, without affirmation, the state-by-state liquor distribution system may institutionalize price discrimination. As the District Court noted, "market areas do not always coincide with state borders." *Healy II*, 669 F. Supp. at 546. Thus, for example, when brewers and importers fix prices in New York state, wholesalers throughout the entire state benefit from [illegible]ew York City's market concentration. A Connecticut whole[illegible]er in Stamford, Connecticut, approximately 50 miles from Ne[illegible] City and arguably serving the same market as New Yor[illegible]nder the scheme advocated by Appellees

would not have the benefit of the indigenous competitive forces at work within this market. Ironically not only might this wholesaler be arbitrarily placed at a competitive disadvantage in regard to a counterpart in Westchester, New York, but higher prices charged to a Stamford wholesaler might in effect subsidize lower prices charged to a wholesaler far removed geographically from this market, for example in Syracuse, New York. A wholesaler in Syracuse, New York, which by market standards would not maintain any legitimate "competitive advantage," consequently benefits by New York state law which ties New York City prices to Syracuse prices.

In short, the existing national liquor distribution system as regulated on a state-by-state basis is not a free market and does not afford unregulated price competition.

Short of restructuring the entire national liquor distribution system through repeal of the Twenty-First Amendment, Appellees are attempting to delineate arbitrary market boundaries along state borders. In practice, liquor markets in states are protected markets by virtue of the operation of state regulatory schemes enacted under the Twenty-First Amendment. Liquor markets within state boundaries are protected by state statutes that establish a uniform statewide price for liquor despite varying market concentrations throughout each state.

For example, the same price for beer is charged to wholesalers in Syracuse and New York City, despite a substantially different market concentration in New York City. The Syracuse market, and other markets in the state of New York, are therefore protected by the single price posting mechanism established by the state of New York. The price posted in New York state consequently has no relation to what a competitive market would dictate were the distribution of alcoholic liquors treated similarly to distribution of other products such as milk. Thus in the guise of competition, Appellees attempt to have the courts mandate arbitrary price discrimination along state borders. The Connecticut affirmation statute eliminates the price discrimination advocated by Appellees by ensuring fair and evenhanded pricing to Connecticut wholesalers and thereby enhancing both the spirit and intent of the Commerce Clause.

III. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT.

A. The Connecticut Affirmation Statute Constitutionally Harmonizes The Twenty-First Amendment And Commerce Clause.

Pursuant to the Twenty-First Amendment, states have absolute control in regulating the sale and distribution of beer within their borders. The Twenty-First Amendment therefore creates fifty distinct artificial markets based along geographical state borders. As a result, there is no free market pricing in the importation, distribution and sale of alcoholic liquor. Given the scheme advocated by Appellees, state boundaries would artificially divide geographical markets. They propose to establish arbitrary price distinctions along artificial boundaries in what would constitute a single U.S. market were there no Twenty-First Amendment. However, there is a Twenty-First Amendment—an amendment which carves an exception to the regular operation of the U.S. market.

As previously discussed, were there a free market in alcoholic liquor, the brewers would presumably charge a lower price to New York City wholesalers given the market concentration in New York City. Syracuse wholesalers would arguably be offered a higher price absent equivalent market concentration. The New York liquor regulations, however, ignore the realities of distinct markets and mandate that the same posted price be offered to wholesalers in these two cities. The state regulatory schemes therefore eliminate free market competition *within* states.

As the brewers are restrained by the New York regulatory scheme from charging true market prices to the respective markets within New York state, a corollary suggests that other parts of bordering states, arguably involved in the New York City market in other products, such as Newark, New Jersey or Bridgeport, Connecticut may have artificially higher prices.

As previously discussed, prices for beer have been traditionally higher in Connecticut than the border states. *Healy II*, 669 F. Supp. at 546. By charging higher prices for beer in Connecticut, the brewers presumably have been able to recoup revenues lost through the elimination of normal price competition within other states such as New York. Connecticut residents, therefore, may be subsidizing lower prices to New York residents in markets like Syracuse. Such an inequitable pricing scheme results from an arbitrary and selective application of the Twenty-First Amendment as demanded by Appellees in this case.

In contrast, the Connecticut affirmation provisions at issue seek to harmonize the Twenty-First Amendment and Commerce Clause. Exercising its Twenty-First Amendment powers, Connecticut has attempted to inject competition and market pricing into the region by guaranteeing evenhanded treatment to its wholesalers. While the Twenty-First Amendment eliminates free market pricing between states, Connecticut's statute establishes equal footing between wholesalers in Connecticut and the border states, eliminating the artificially high prices charged to the Connecticut wholesalers.

The Connecticut statute operates to enhance the Connecticut wholesaler's ability to compete by requiring evenhanded pricing. In practice, the Twenty-First Amendment and state liquor regulatory statutes operate to eliminate competition between beer wholesalers. Given a consumer's ability to purchase alcoholic liquor at retail outlets wherever he or she wishes, a Connecticut wholesaler that is arbitrarily charged higher prices than his counterparts in other states will ultimately be economically disadvantaged. Because there is no effective way to compete with wholesalers in border states, Connecticut wholesalers must then suffer arbitrarily higher prices, putting them *a priori* at a disadvantage without any opportunity to compete. The pricing schemes advocated by the brewers would thereby institutionalize these economic disadvantages by mandating arbitrary price discrimination.

In short, it is the Connecticut statute which seeks to promote Commerce Clause principles by enhancing fair com-

petition and not, as with the scheme proposed by Appellees, violate them. The Court of Appeals erred in finding a Commerce Clause violation in that the Connecticut statute conforms with both the spirit and intent of the Commerce Clause.

B. The U.S. Court Of Appeals Erred In Attributing Extraterritorial Effects To The Connecticut Affirmation Statute.

The District Court was correct in concluding that the Connecticut statute does not directly regulate or discriminate against interstate commerce. *Healy II*, 669 F. Supp. at 533. Since posting in Connecticut occurs at a moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way influence or inhibit price changes by out-of-state shippers at any time. Clearly a price change by a shipper in another state cannot constitute a violation of the amended Connecticut law. Moreover, there is no possibility that Connecticut's affirmation law regulates prices in other states.

Notwithstanding these distinctions, the Appellees argued, and the Second Circuit Court of Appeals ruled, that an impermissible extraterritorial effect remains apparent on its face because brewers are in fact not free to change prices in other states because of regulatory restrictions in those other states. Citing the monthly price hold laws in Massachusetts, 138 M.G.L.A. Sec. 25B(d), and the 180 day hold on price reductions mandated by New York law, N.Y. Alco Bev. Cont. Law Sec. 55-b(2) (McKinney 1987), the court found that brewers must still look ahead to consider the impact of their pricing decisions on Connecticut when making pricing decisions in Massachusetts and New York. *Healy II*, ____F.2d____ App. A at pp. 10A–12A.

It is well settled that the practical effect is the critical consideration in determining whether an affirmation statute

is 'per se' invalid under the Commerce Clause. In applying the *Pike per se* analysis to an affirmation statute, courts have considered whether the statute escapes the state borders to control liquor prices in other states. *Brown-Forman*, 476 U.S. at *583* citing *Southern Pacific Co. v. Arizona*, 335 U.S. 761, 775 (1945). However, in this case, Connecticut has done all that it can to remove the extraterritorial effect of its legislation. The Connecticut affirmation provisions do not bar, deter, or delay price decisions in other states. They specifically leave brewers free to select their own price levels in other states. The fact that there are regulatory restrictions on price changes in other states is a matter beyond Connecticut's control. Connecticut has done all that it can do to avoid interference with pricing decisions in other states.

Connecticut eliminated extraterritorial effects of the affirmation statute by enacting the amended affirmation provisions which invite the brewers to change prices in other states at any time. Unlike the New York law in *Brown-Forman*, it is not a violation of the Connecticut statute to change prices in any other state at any time. Nor does Connecticut attempt to influence prices or pricing decisions in other states. Connecticut merely guarantees its residents the lowest price among the border states at an exact moment in time. Any extraterritorial effect is thereby eliminated. Apparently in deference to this logic, plaintiffs at one point withdrew argument on this point. *Healy II*, ____F. 2d____. App. A at p. 6A.

This position is consistent with a recent Supreme Court decision concerning an Indiana tender offer statute. In *CTS Corporation v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987), (hereinafter "*CTS*"), the Court held that as long as the state only regulated Indiana corporations, the Commerce Clause was not violated. 107 S.Ct. at 1649. The Court went on to discuss the Court of Appeals' analysis relating to balancing the state and federal interests. Rather than engage in a balancing approach, the Supreme Court simply suggested that the substantial and legitimate state interest in regulating corporate governance was permissible and emphasized that courts should exercise judicial restraint in evaluating the

wisdom of state laws that may have some impact on interstate commerce.

> The Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation. 107 S. Ct. at 1651.

The *CTS* opinion bears significantly on this case for two reasons. First, it indicates that the Court has employed a more limited method for evaluating Commerce Clause challenges. By focusing on protectionism, the Court has eliminated *ad hoc* balancing analyses that must inevitably weigh the incidental burdens of state legislation on interstate commerce.

Second, given the focus on *CTS* on protectionism, and away from the extraterritorial effects that frequently accompany state legislation, the opinion suggests that Courts should defer more frequently to a state's legitimate and constitutional exercise of power. To the extent that state discriminatory intent is proscribed by the Commerce Clause, federal courts consequently should not engage in evaluating the wisdom of state policies simply because they have some incidental interstate impact.

Despite the foregoing arguments, the Court of Appeals found that an extraterritorial effect persisted because statutory regulations in the border states, interacting with the Connecticut statute, prevent the brewer's free exercise in pricing decisions. *Healy II*, ____F.2d____; App. A at pp. 10A-12A. The court found that the brewers must consider the impact of their pricing decision on Connecticut when making pricing decisions in border states as a result of the Connecticut beer affirmation provisions. *Healy II*, ____F.2d____; App. A at p. 11A.

The Court of Appeals' analysis suggest that it is the entanglement of the border states' statutes with the Connecticut statute which forces the brewers to consider the Connecticut statute when making pricing decisions. Arguably, Connecticut

is victimized by other states exercising their own Twenty-First Amendment rights through institutionalization of "first in time, first in right" lawmaking. The Second Circuit opinion, if upheld, would mean that pre-existing restrictive regulatory schemes in certain states may prevent states like Connecticut from enacting otherwise permissible statutes under the Twenty-First Amendment.

Ironically, Connecticut's statute is restricted by the extra baggage of the regulatory schemes in the border states under the foregoing Commerce Clause analysis. Rather than adhere to this illogical result, examination of Connecticut's statute under Commerce Clause scrutiny should restrict itself to the constitutionality of the Connecticut beer affirmation provisions in their own right. To do otherwise permits other states to turn both the Commerce Clause and the Twenty-First Amendment on their heads, and in effect to legislate within the borders of Connecticut.

In *Brown-Forman*, the Court enunciated the test for determining whether a statute causes an extraterritorial effect as whether a state's legislation controls prices in other states. The Connecticut affirmation statute, while referencing prices in other states, makes no attempt to control, influence or dissuade the brewers from changing prices in other states. Connecticut cannot legislate prices beyond its borders and makes no attempt to do so. Because the brewers may change prices in other states at anytime in compliance with the regulatory schemes of those states, there is no extraterritorial effect associated with the Connecticut statute.

C. The Court Of Appeals Erred In Not Exercising An Appropriate Level Of Judicial Restraint In Applying *Seagram* And Upholding Connecticut's Beer Affirmation Provisions.

The District Court correctly applied the constitutional standard enunciated in *Seagram* in upholding Connecticut's beer affirmation provisions. In upholding the affirmation

statute in *Seagram*, this Court found that "[t]he mere fact that [the affirmation statute] is geared to appellants pricing policies in other states is not sufficient to invalidate the statute." 284 U.S. at 42.

The Law in *Seagram* was more restrictive than the Connecticut law in that it required that the monthly price schedules for sales to wholesalers and retailers, as filed with the New York State Liquor Authority, be accompanied by an affirmation that "the bottle and case price of liquor . . . is not higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. 284 U.S. at 39-40.

Holding for the state, the Court added that the appellant's argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not with the domain which the Constitution forbids." 284 U.S. at 43. It is worth noting that the record below is devoid of any evidence of economic harm to the brewers in the State of Connecticut or the border states; the harm, if any, remains conjecture.

Dating back to 1952, the Supreme Court noted that "we do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *DayBrite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Additionally, in *Seagram* the Supreme Court found that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws . . . it is up to the legislature, not the courts to decide on the wisdom and utility of legislation." 284 U.S. at 47; *Ferguson v. Skrupa*, 372 U.S. 726, 728-730 (1963). The Court's inclination to adhere to principles of judicial restraint has significantly increased during the past decade.

As the Supreme Court noted in *Vance v. Bradley*, 440 U.S. 93, 112 (1979), "when the legislature's purpose is legitimate

and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . no less than debates over the wisdom of other socioeconomic legislation . . . are not to be carried out in the federal courts." As recently as 1987, the Supreme Court reaffirmed this position: "the Constitution does not require the states to subscribe to any particular economic theory. We are not inclinded to second guess the empirical judgments of lawmakers concerning the utility of legislation." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981); *See also CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

The District Court's application of *Seagram* and exercise of an appropriate level of judicial restraint in *Healy II* in upholding Connecticut's beer affirmation law are thus consistent with prevailing judicial norms. Despite Supreme Court precedent upholding the Connecticut affirmation law, the United States Court of Appeals erroneously chose to ignore the applicability of the *Seagram* decision to this case:

> In fact, the *Seagram* court recognized that it perhaps had not had the last word, observing that there would be "time enough to assess the alleged extraterritorial effects" of affirmation statutes "when a case arises that clearly presents them," 384 U.S. at 43. This is such a case. Accordingly, we decline to extend the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders. *Healy II*, ____F.2d____; App. A at p. 13A.

Appellants agree with the Court of Appeals in that "this is such a case" that merits review by this Court in light of the Court of Appeals' reluctance to apply Supreme Court precedent. Appellants consequently submit that this Court should grant jurisdiction to reverse the decision of the U.S. Court of Appeals for the Second Circuit.

CONCLUSION

The Twenty-First Amendment sanctions Connecticut's Liquor Control Act including its affirmation provisions.

Connecticut's amended beer price affirmation provisions are constitutional under the Commerce Clause. Connecticut's statute is facially valid under the *Pike* "per se" standard and withstands constitutional scrutiny under the *Pike* balancing test. Moreover, the Connecticut affirmation provisions promote Commerce Clause principles by eliminating arbitrary price discrimination.

Finally, the Court of Appeals erred in attributing extraterritorial effect to the Connecticut affirmation statute and in failing to exercise an appropriate level of judicial restraint in applying *Seagram*.

For all the foregoing reasons, we urge this Court to note probable jurisdiction. In the alternative, and if appropriate, we urge the Court to enter an order summarily reversing the decision of the United States Court of Appeals for the Second Circuit and affirming the original judgment of the United States District Court for the District of Connecticut.

Respectfully Submitted,

Wine & Spirits Wholesalers of Connecticut, Inc.

/s/ William A. Wechsler

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September 12, 1988

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al,
Appellants,

v.

THE BEER INSTITUTE, et al,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 721 — August Term, 1987

(Argued March 18, 1988 Decided JUN 13 1988)

Docket No. 87-7880

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York and Rhode Island:

Anheuser-Busch, Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY INC., MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC., GUINESS-HARP CORP.; LABATT IMPORTERS, INC., MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.,

Plaintiffs-Appellants,

—against—

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants-Appellees,

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.,

Intervenors
Defendants-Appellees.

Before: TIMBERS, PRATT and MINER, *Circuit Judges.*

Appeal from a summary judgment in favor of appellees entered in the United States District Court for the District of Connecticut (Dorsey, J.), holding that the amended beer price affirmation provisions of the Connecticut Liquor Control Act did not violate the commerce clause.

Reversed.

JEFFREY GLEKEL, New York, NY (Timothy G. Reynolds, Skadden, Arps, Slate, Meagher & Flom, New York, NY; William H. Allen, Covington & Burling, Washington, DC; Jerome I. Chapman, Arnold & Porter, Washington, DC; Gary Nateman, The Beer Institute, Washington, DC, of counsel) *for Plaintiffs-Appellants.*

ROBERT F. VACCHELLI, Asst. Conn. Atty. Gen., Newington, CT (Joseph I. Lieberman, Conn. Atty. Gen., Richard M. Sheridan, Asst. Conn. Atty. Gen., of counsel) *for Defendants-Appellees.*

WILLIAM A. WECHSLER, Hartford, CT (Alfred F. Wechsler, Gregory J. Southworth, Bailey & Wechsler, Hartford, CT, of counsel) *for Intervenors Defendants-Appellees.*

MINER, *Circuit Judge:*

Plaintiffs-appellants The Beer Institute (formerly United States Brewers Association), an industry association of beer brewers and importers, *et al.*, commenced an action in the United States District Court for the District of Connecticut (Dorsey, J.) against defendants-appellees John F. Healy and David L. Snyder, as Commissioners of the Connecticut Department of Liquor Control, and Charles Kasmer, as Secretary of the Department. The complaint asserted that the amended beer price affirmation provisions of the Connecticut Liquor Control Act, 1984 Conn. Acts 332, 432, and § 30-63a(b) of that Act violate the commerce clause, U.S. Const. art. I, § 8, cl. 3, and the supremacy clause, *id.* art. VI, cl. 2. Plaintiffs sought declaratory and injunctive relief to prevent enforcement of these provisions.

Upon cross-motions for summary judgment, the district court granted judgment for the defendants, holding that the challenged provisions were constitutional. *See United States Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987). Plaintiffs appeal from this judgment. Because we find that the amended beer price affirmation provisions place an unconstitutional burden on interstate commerce, we reverse.

BACKGROUND

In *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982) ("*Healy I*"), *aff'd*, 464 U.S. 909 (1983) (per curiam), we found that the original beer price affirmation provisions of the Connecticut Liquor Control Act placed an unconstitutional burden on interstate commerce. The Act, now as then, requires "posting" of prices, whereby brewers and out-of-state beer importers "file a schedule stating the per-unit price that [they] will charge Connecticut wholesalers for [beer] products in the following month," *id.* at 276 (footnoted omitted); *see* Conn. Gen. Stat. Ann. § 30-63c (West 1975 & Supp. 1988). Posted prices become effective on the first day of the calendar month following the posting. *See* Conn.

Agencies Regs. § 30-6-B12(b). We noted that "[h]istorically the retail price of beer has been generally higher in Connecticut than in its neighboring states, *i.e.*, Massachusetts, New York, and Rhode Island," 692 F.2d at 276.

To encourage Connecticut residents to buy beer in-state rather than in the neighboring states, the legislature added beer price affirmation provisions to the Act. These provisions required that: (1) brewers adhere to the posted prices during the one-month period for which they were posted, Conn. Gen. Stat. Ann. § 30-63(c); (2) brewers file a sworn affirmation that their posted per-unit prices would be no higher than their prices in the border states for the same period, *id.* § 30-63b(b); (3) Connecticut wholesalers be charged per-unit prices by each brewer no higher than the lowest wholesale price the brewer charges in any border state, *id.* § 30-63a(b); (4) adjustments for rebates, discounts, allowances and any other inducements offered to out-of-state wholesalers be considered in calculating the "lowest" price, *id.* § 30-63c(b); and (5) brewers offer to Connecticut wholesalers all the sizes and packages of their brands offered to border state wholesalers, *id.* Because there are no breweries in Connecticut and all beer is shipped into Connecticut from other states, only out-of-state brewers and importers are affected by the Connecticut price affirmation law.

In striking down the price affirmation provisions as facially invalid, this court observed that they told "a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers," *Healy I*, 692 F.2d at 282. "Thus," we concluded, "the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut," *id.*, in violation of the commerce clause.

Thereafter, the Connecticut Legislature amended the affirmation provisions with the stated purpose of remedying the constitutional problem. Section 30-63b(b) was amended to provide that the "lowest" price charged to border-state wholesalers is determined "at the time of posting," 1984 Conn. Acts 332 ("84-332").[1] At the same time, section 30-63b(e)[2] was added, providing that § 30-63b did not prohibit brewers from changing prices in other states "at any time during the calendar month covered by such posting." However, § 30-63a(b),[3] which prevents brewers from charging Connecticut wholesalers more than their lowest border-state price during the posted period, was not amended. Section 30-63c(b), which establishes how price will be determined under the statute, also was amended by 84-332 to refer to "price . . . at the time of posting." Another amendment applicable to § 30-63c(b) contained a conflicting description of price. This amendment permits only differentials in state taxes and actual delivery costs to be excluded from the determination of "the lowest price" charged to any border-state wholesaler "*during such posted period*," 1984 Conn. Acts 432 ("84-432")[4] (emphasis added), despite the "time of posting" amendment made by 84-332.

Appellants commenced this action on July 25, 1984. In their complaint appellants alleged that " 'the interaction of the posting and affirmation provisions' " of 84-332 and § 30-63a(b) " 'not only limits the price at which out-of-state shippers may sell to Connecticut wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month,' " 669 F. Supp. at 547 (quoting Complaint at 14). " 'Thus,' " they alleged, " 'as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price,' " *id.* This, they claimed, violated not only the commerce clause, but the supremacy clause as well, "by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers," *id.*

The state recognized that § 30-63a(b) " 'standing alone' " seemingly would prevent brewers from lowering the out-of-state prices of products they also sold in Connecticut during the entire month after posting. The state argued, however, that 84-332 made it clear that the price affirmed as the lowest price in the border states need only be effective *at the moment of posting:* brewers are free both before and after posting to raise or lower their prices outside Connecticut. (The posted Connecticut price remains in effect for the following calendar month.) The state submitted a Declaration and Ruling of the Connecticut Liquor Control Commission, made pursuant to the Commission's discretionary authority to "issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency," Conn. Gen. Stat. Ann. § 4-176, providing, *inter alia:*

> "[W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly. . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price."

669 F. Supp. at 547 n.9 (quoting Affidavit of the Liquor Commission at 3–4). Thereafter, appellants withdrew their supremacy clause claim. *See id.* at 548.

The district court observed that "[t]he ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut

(and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states," *id.* at 547 (footnote omitted). Judge Dorsey found that "[t]he 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous," *id.* at 551–52.[5] He therefore framed the issue as "whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause," *id.* at 552.[6]

Judge Dorsey had "little doubt that Connecticut's present affirmation law would be constitutional under *Seagram [v. Hostetter,* 384 U.S. 35 (1966)]," *id.*, which upheld a *retrospective* affirmation requirement that the New York wholesale price was no higher than the lowest price in any other state during the *preceding* month. However, noting that *Seagram* had been questioned by the Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573 (1986), Judge Dorsey held that the affirmation provisions nonetheless were constitutional, both on their face and in their effect, because: (1) "unlike the version in *Healy I* and *Brown-Forman,*" this statute "leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce," 669 F. Supp. at 553; (2) "Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices," *id.;* and (3) the statute "operates even-handedly" and legitimately reduces price discrimination against Connecticut wholesalers, *id.* Holding the amended price affirmation provisions constitutional, he stated, "comports with the presumption of validity to which all economic regulatory legislation is entitled" and "with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states," *id.* at 552.

On appeal, appellants, as they did in *Healy I,* "have launched an all-out attack on the Connecticut beer price affirmation provisions under the [c]ommerce [c]lause," 692 F.2d at

281, contending that the provisions are protectionist in purpose and effect, are subverted by the *Brown-Forman* decision because it has "significantly undermine[d]" the precedential authority of *Seagram*, and operate to regulate beer prices in the border states in violation of the commerce clause and in excess of Connecticut's regulatory powers under the twenty-first amendment. Because we agree that the realities of beer price regulation in the border state area show that Connecticut's statute inevitably exercises control over "the prices set for sales occurring wholly outside its territory," *id.* at 282, we do not reach the issue of economic protectionism. Accordingly, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the Constitution.

DISCUSSION

A. Commerce Clause

The commerce clause generally forbids "[s]tate regulation that is designed to confer economic benefits on [its] businesses and residents . . . at the expense of businesses and residents of other states," *Healy I*, 692 F.2d at 279; *see, e.g., Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977). However, "the fact that the law may not have been intended as protectionist or discriminatory will not save it" when the "effect of a state's law is to regulate conduct occurring wholly outside the state," *Healy I*, 692 F.2d at 279; *see, e.g., Edgar v. Mite Corp.*, 457 U.S. 624, 642–43 (1982) (opinion of White, J.); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925). Thus, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it generally is invalidated "without further inquiry," *Brown-Forman*, 476 U.S. at 579; *see, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). When a statute only indirectly affects interstate commerce and regulates evenhandedly, the inquiry is "whether the [s]tate's interest [in regulation] is

legitimate and whether the burden on interstate commerce clearly exceeds the local benefits," *Brown-Forman*, 476 U.S. at 579; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Supreme Court has emphasized that whether the regulation is direct or indirect, "the critical consideration is the overall effect of the statute on both local and interstate activity," *Brown-Forman*, 476 U.S. at 579; *see Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440–41 (1978), and the interaction of the statute with the regulatory schemes of neighboring states constitutes an "overall effect" which appropriately is considered. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality) (Iowa law prohibiting 65-ft. double-trailer trucks "now out of step with the laws of all other Midwestern and Western States"); *Raymond Motor Transp.*, 434 U.S. at 445 (Wisconsin double-truck length limitations prevented interline transfers "from carriers that operate only in the 33 States where the doubles are legal"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527–28 (1959) (interference with interline transfers by unique Illinois mudguard law); *Southern Pacific Co.*, 325 U.S. at 774–75 (1945) (Arizona train-length law effectively "control[led] train operations beyond the boundaries of the state" by requiring dismantling and reforming of interstate trains at state line); *see also Silver v. Woolf*, 694 F.2d 8, 14 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

The district court found that the amended Connecticut beer price affirmation provisions do not regulate interstate commerce because they do not prohibit brewers from raising or lowering beer prices in the border states prior to, or following, the Connecticut posting. However, the court did not examine whether in fact the interaction of the Connecticut provisions with the beer price regulations of bordering states would allow such pricing flexibility. Since Connecticut has chosen to regulate beer prices *in reference to* the regulated prices in the border states, it is particularly appropriate to examine the effect of the Connecticut beer price affirmation provisions resulting from their interaction with the regulatory

schemes of the border states. *See Brown-Forman*, 476 U.S. at 580, 583–84.

The Massachusetts beer pricing scheme requires brewers to post prices by the first day of the month to become effective on the first day of the following calendar month. These posted prices cannot be changed by the brewer. *See* Mass. Ann. Laws ch. 138, § 25B(d) (Law. Co-op. 1981). As interpreted by the Liquor Control Commission, the Connecticut law requires brewers to affirm that the beer prices they post, at 10:00 a.m. on the sixth day of each month, *see* Conn. Agencies Regs. § 30-6-B4a, are no higher than the prices that the brewer is then charging in the border states.

Thus, for example, a brewer who posts his February prices for Massachusetts on January 1 must look ahead to the posting and affirmation of his March prices on February 6 in Connecticut. The February prices that he posts in Massachusetts on January 1 will be effective and unchangeable at the time he must post and affirm his Connecticut prices for March on February 6. Therefore, the brewer cannot post a price in Massachusetts that is lower than the price he plans to post over a month later in Connecticut. In this way, a brewer posting his next-month's beer prices in Massachusetts does so under the restriction of Connecticut's affirmation law, which requires that the Connecticut price not be "higher than the lowest price at which such item is then being sold or offered for sale or shipped . . . to any wholesaler" in a border state, Conn. Gen. Stat. Ann. § 30-63a(b). Moreover, the price that the brewer posts in Massachusetts, as he looks ahead to the Connecticut affirmation day, will be effective not merely on that day, but for that *entire* month in Massachusetts. A brewer can therefore undertake competitive pricing based on the market realities of either Massachusetts or Connecticut, but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states.

In New York, a price that is decreased "per case, draft package or special package of beer sold to beer wholesalers"

cannot be raised for at least 180 days. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987). A brewer who plans to decrease his New York prices on a particular beer package, like the brewer posting his prices in Massachusetts, is confronted with the Connecticut posting and affirmation requirements. Once a price decrease becomes effective in New York, that price will control the price he may offer in Connecticut. On the sixth day of each month in which the New York price reduction is effective, the Connecticut statute will not allow the brewer to charge a higher price in Connecticut for the following month, no matter what the market realities would otherwise dictate. Thus, a brewer could not raise his Connecticut price above the New York level for a total of six calendar months, because the Connecticut statute, in effect, makes the New York pricing decision a decision for Connecticut as well. In addition, the Connecticut affirmation day falling in the last month of the New York price decrease would give Connecticut the benefit of the decreased price for a calendar month beyond the date that it terminates in New York. Clearly this restricts a brewer's ability to promote a beer in New York that also is sold in Connecticut. Moreover, a brewer who sells in both markets would be severely hampered in his ability to respond to market forces, particularly to the competitive demands of the New York City market, the most competitive and lowest priced market in the four-state region, *see* 669 F. Supp. at 546.

Both the Massachusetts and New York statutes provide for administrative exemptions from the beer pricing laws. *See* Mass. Ann. Laws ch. 138, § 25B(d) (exemption only by "written permission of the [Alcoholic Beverages] [C]ommission . . . granted for good cause shown and for reasons not inconsistent with the purpose of this chapter"); N.Y. Alco. Bev. Cont. Law § 55-b(3)(c) ("for good cause shown to its satisfaction" Liquor Authority "may grant waivers to licensees adversely affected by this section"). However, the possibility that an administrative agency may in its discretion grant a deviation from regulatory requirements cannot save the Connecticut statute or shift the responsibility for its effects upon the

regulatory bodies of other states. As the Court observed in *Brown-Forman*, "[w]e would not solve the constitutional problems inherent" in Connecticut's amended affirmation provisions "by indulging the . . . assumption that the [Liquor] Authority will be sensitive to [c]ommerce [c]ause concerns. . . . The protection afforded by the [c]ommerce [c]lause cannot be made to depend on the good grace of a state agency," 476 U.S. at 582 n.5.

Connecticut's affirmation provisions also regulate beer prices in another way: restricting a brewer's ability to offer volume discounts in the border states. While volume discounting is unlawful in Connecticut, *see* Conn. Gen. Stat. Ann. § 30-63(b), it is not generally prohibited in the border states. Brewers complying with the Connecticut affirmation statute must affirm that their prices for the entire state are no higher than any volume-discounted prices offered in competitive border-state markets. The effect of the Connecticut statute is to restrict a brewer's ability to offer volume discounts in competitive markets of the border states since the brewer could then not charge a higher price in the less competitive Connecticut market. In this way, as well, the Connecticut statute regulates pricing in other states.

Connecticut urges us to uphold the statute under *Seagram*. However, Connecticut can find no solace in *Seagram*. We observed in *Healy I* that "the holding in *Seagram* might well validate beer price regulation less intrusive than the" former Connecticut affirmation provisions, "such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set it in the surrounding states," 692 F.2d at 283–84. We did not thereby endorse regulation which had the effect of controlling wholesaler beer prices in other states. In fact, we indicated that the validity of such an amended scheme turned on its "leaving those out-of-state prices unregulated by Connecticut," *id.* at 284.

Moreover, the Court has cast doubt upon the continuing validity of the principles underlying *Seagram*. The *Brown-Forman* majority did "not necessarily attach constitutional

significance to the difference between a prospective statute," such as the one it struck down, "and the retrospective statute at issue in *Seagram*." 476 U.S. at 584 n.6. The Court recognized that "one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case" but declined to "consider the continuing validity of *Seagram*" since no retrospective statute was before the Court. *Id.* Writing separately, Justice Blackmun would have overruled *Seagram* as "a relic of the past" decided "when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes," *id.* at 586 (Blackmun, J., concurring). He saw "no principled distinction" between the two types of statutes because both, "despite one's best efforts at fine-tuning, operat[e] to affect out-of-state transactions and violat[e] the [c]ommerce [c]lause," *id.*; Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 188 (1987) (concluding "that *all* liquor price affirmation statutes violate the commerce clause").

We, of course, are not empowered to overrule Supreme Court precedent. However, we clearly perceive that the basis of the *Seagram* decision has been eroded and that the Court has indicated strongly that *Seagram* may not survive the decision in *Brown-Forman*. In fact, the *Seagram* court recognized that it perhaps had not had the last word, observing that there would be "time enough to assess the alleged extraterritorial effects" of affirmation statutes "when a case arises that clearly presents them," 384 U.S. at 43. This is such a case. Accordingly, we decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders.

B. **Twenty-First Amendment**

Connecticut maintains that the beer price affirmation provisions represent a valid exercise of its power under the twenty-first amendment "to regulate, or prohibit entirely, the

transportation or importation of intoxicating liquor within [its] borders," *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 726 (1987). However, "[i]t is well settled that the [t]wenty-first [a]mendment did not entirely remove state regulation of alcohol from the reach of the [c]ommerce [c]lause." *Brown-Forman*, 476 U.S. at 584. The amendment reserves to states power to regulate " '*transportation* or *importation*' " of liquor " '*into* any [s]tate . . . for delivery or use *therein*,' " *Healy I*, 692 F.2d at 281 (emphasis added), but in no way "modifies the traditional [c]ommerce [c]lause principles that bar a state from regulating the transport, sale, or use of products outside of its own territory," *id.* Thus, our conclusion that the Connecticut statute acts as a direct regulation of beer pricing in other states sufficiently disposes of this issue. *See Brown-Forman*, 476 U.S. at 585. Moreover, the extraterritorial effect of Connecticut's affirmation provisions, particularly as to volume discounting, "may interfere with the ability of other [s]tates to exercise their own authority under the [t]wenty-first [a]mendment" by impinging upon their "regulatory goals" or by "depriv[ing] their citizens of the opportunity to purchase brands of liquor that are sold" in Connecticut, *id.*

CONCLUSION

In light of the foregoing, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the commerce clause. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of plaintiffs.

FOOTNOTES

[1] As amended by 1984 Conn. Acts 332, § 30-63b(b) provides:

> At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-

(continued)

of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[2] As added by 1984 Conn. Acts 332, § 30-63b(e) provides:

> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

[3] Section 30-63a(b) provides:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] 1984 Conn. Acts 432 provides in pertinent part:

> In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible].

[5] A "retroactive" affirmation statute "require[s] prices to an in-state wholesaler to be at the lowest price at which the product was sold elsewhere during an earlier time period." *Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383, 1385 (D. N.M. 1987). "Prospective" affirmation "uses as its reference point the price for out-of-state sales

(continued)

of liquor in the future." *Id.* A "simultaneous" (also known as "contemporaneous" or "concurrent") affirmation requires that "at *the moment*" of posting or sale the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere." *See id.; see also* Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 190 n.31 (1987) ("Simultaneous statutes . . . represent a subdivision of the prospective category," retaining its "future-price orientation" but allowing "freedom to change [out of state] prices after the schedule's effective month has begun.").

[6] Several courts have found that simultaneous price affirmation statutes directly regulate out-of-state liquor prices in violation of the commerce clause. *See Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383 (D. N.M. 1987); *Brown-Forman Corp. v. Tennessee Alco. Bev. Comm'n*, No. 3-86-0926, slip op. (M.D. Tenn. June 30, 1987); *Brown-Forman Corp. v. South Carolina Alco. Bev. Comm'n*, 643 F. Supp. 943 (D. S.C. 1986). The affirmation required by these statutes, however, was not simultaneous with posting, but rather with each sale: Brewers were required to affirm that "*at the moment of sale*" the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere," *Brown-Forman*, 672 F. Supp. at 1385. *See Brown-Forman*, slip op. at 2; *Brown-Forman*, 643 F. Supp. at 947.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, et al.	:	
—vs—	:	Civil No. H-84-816 (PCD)
JOHN T. HEALY, et al.	:	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs are the United States Brewers Association ("USBA") — an industry association of thirty-nine domestic brewers and twenty-three importers of beer — and those of its member companies who sell beer in Connecticut and in the bordering states of Massachusetts, New York and Rhode Island.

Defendants are the Commissioners and Secretary of the Connecticut Department of Liquor Control.

Intervening defendant Wine & Spirits Wholesalers of Connecticut is a trade association of seven companies which sell alcoholic beverages, including beer, at wholesale within Connecticut.

Plaintiffs' complaint seeks a declaratory judgment that the beer price affirmation provisions of Conn. Pub. Act

84-332,[1] 84-432[2] and § 30-63a(b) of the Connecticut Liquor

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[1] Conn. Pub. Act 84-332 provides, in relevant part:

> Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler and out-of-state shipper permittee for the month following such posting.
>
> . . . .
>
> . . . .
>
> At the time of posting of the bottle, can, keg or barrel and case price . . ., every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that at the time of posting the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. . . .
>
> . . . .
>
> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state . . . at any time during the calendar month covered by such posting. . . .
>
> In determining the lowest price for which any item of beer is or was sold . . . at the time of posting, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for the actual costs of delivery are permissible. . . . A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state. . . .

[2] Conn. Pub. Act 84-432 provides, in part: "In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible]."

Control Act[3] violate the commerce clause[4] and the supremacy clause[5] of the United States Constitution. Plaintiffs also seek a permanent injunction to restrain defendants from enforcing these statutes.

Currently pending are cross-motions for summary judgment, which have been exhaustively and intelligently briefed and rebriefed by the USBA, the intervening defendants and the State Attorney General's Office. For the reasons that follow, USBA's motion is denied, and the motion of defendants and intervening defendants is granted.

I. Background

A. The Beer Industry[6]

The beer industry in Connecticut is divided into three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. Each market participant must hold a valid

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[3] Section 30-63a(b), Conn. Gen. Stat., provides, in part, that:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer . . . at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] "Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 4.

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[6] This description is based on submissions of the parties as well as the findings of Blumenfeld, J., in *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312 (D. Conn.), *rev'd*, 692 F.2d 275 (1982), *aff'd*, 464 U.S. 909 (1983).

Connecticut license to sell, in Connecticut, alcoholic beverages to the tier below and, ultimately, to consumers.

The brewers and importers market national brands such as Budweiser or Miller High Life, and regional or local brands such as Genesee Cream Ale or Piels. There are no breweries in Connecticut. All beer — national or regional — is shipped into Connecticut by brewers and importers designated as "out-of-state shippers" under Connecticut law.

Plaintiffs contend that prices charged and package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets within the four state area. (Market areas do not always coincide with state borders.) In certain markets, regional brewers or importers price their beers to allow sales to consumers at the lowest prices possible in those markets. Other brewers or importers competing in these areas must consider this competitive pricing in pricing their own product. It is agreed by all parties that the New York City market is the most competitive and prices there are the lowest in the four-state region. Other factors which have an impact on pricing and marketing decisions, such as consumer tastes, packaging, costs and freight, vary from area to area even within these states. Thus, according to plaintiffs, a variable pricing and marketing structure has emerged in Connecticut and the bordering states which results in substantial interstate competition in retail beer sales.

In Connecticut, typically more than one wholesaler sells an out-of-state shipper's products. Each wholesaler generally handles products of more than one out-of-state shipper but is restricted by law from selling to retailers outside its assigned geographical territory.

The primary retail outlets for off-premise consumption of beer in Connecticut are package and grocery stores. Retailers, particularly near the borders, face substantial competition from retail beer outlets in the bordering states. Although prices charged to Connecticut wholesalers are

neither the highest nor the lowest in the four-state region, retail prices historically have been higher in Connecticut. Accordingly, many Connecticut residents have purchased beer at lower retail prices in New York, Massachusetts or Rhode Island.

B. **Price Affirmation**

In 1981, Connecticut amended its Liquor Control Act by adding beer price affirmation provisions. The Act required out-of-state shippers to post, each month, the bottle, can and case price for the brands of beer each sells in Connecticut. The amendment required shippers to execute written affirmations under oath certifying that the posted prices "will be no higher than the lowest price at which each such item of beer is *or will be* sold . . . to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting." Liquor Control Act § 30-63b(b), as originally amended by Section 12 of Conn. Pub. Act 81-294 (emphasis added). No brewer or importer could sell beer to a wholesaler in Connecticut at a price higher than the lowest price then charged any wholesaler in any state bordering Connecticut. Liquor Control Act § 30-633a(b), as originally amended by Section 11 of Conn. Pub. Act 81-294. Once posted, the affirmed price became the controlling or fixed price for the ensuing month for the out-of-state shipper's products in Connecticut. Rebates, discounts, special promotions and other inducements which lowered the price of beer in the border states required the price to be lowered in Connecticut, but differentials in price were permitted for different state taxes and delivery costs. No allowance was made for different package configurations (e.g., a case of six-packs versus a case of loose cans or bottles), yet for any brand a brewer offered for sale in Connecticut, it had to offer Connecticut wholesalers all the units of that brand offered to wholesalers in the border states.

Thus brewers and importers in the four-state area had the following alternatives: (1) lower their Connecticut prices to

equal the lowest price in any bordering state; (2) raise prices in border states to the Connecticut levels; (3) withdraw from Connecticut the brands of beer sold at lower prices in the border states; or (4) withdraw from the border states the brands of beer sold at lower prices than the Connecticut price.

The 1981 amendments were upheld by the district court, *United States Brewers Ass'n v. Healy* 532 F. Supp. 1312 (D.Conn. 1982), but declared unconstitutional by the Second Circuit, *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982), (hereinafter *"Healy I"*), *aff'd without opinion*, 464 U.S. 909 (1983). The Court of Appeals held that the price affirmation provisions impermissibly burdened interstate commerce and that the twenty-first amendment[7] did not authorize Connecticut to set minimum prices of beer in any other state.

Thereafter, Connecticut enacted the different version of beer price affirmation set out in notes 1–2, *supra*. Instead of requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute requires only that at the moment of affirmation the prices charged to Connecticut wholesalers *are* no higher than the lowest price then being charged in any border state.

C. The Present Controversy

In their complaint, plaintiffs originally alleged that:

> the interaction of the posting and affirmation provisions of Pub. Act 84-332 with Section 30-63a(b) of the Liquor Control Act not only limits the price at which out-of-state shippers may sell to Connecticut

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[7] "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

> wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month. Thus, as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price.

Complaint at 14. They argue that the new provisions violate the supremacy clause by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers, viz, Connecticut was forcing them to engage in conduct prohibited by federal antitrust laws.

Defendants conceded that, "standing alone," Conn. Gen. Stat. § 30-63a(b), which was not amended following *Healy I*, appeared to prohibit the lowering of out-of-state prices of products sold in Connecticut during the entire month following the posting of Connecticut prices for that product. Defendants' Brief on Motion for Summary Judgment at 8. However, defendants contend that such an interpretation flies in the face of Conn. Pub. Act 84-332 which explicitly recognizes the right of out-of-state shippers to raise or lower their prices outside Connecticut at any time during the month following posting. In further support of their position, defendants filed a declaration and ruling by the Connecticut Liquor Control Commission.[8] The ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut (and *only* at the time of

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[8] Conn. Gen. Stat. § 4-176 states that the Liquor Control Commission "may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency. . . ."

posting), their prices to Connecticut wholesalers are no higher than in the border states.[9]

After the Commission's ruling,[10] plaintiffs withdrew their claim based on the supremacy clause and conceded that the affirmation laws, as interpreted by the Commission, would not directly control prices in the border states. Plaintiffs' Memorandum in Support of Their Cross-Motion for Partial Summary Judgment at 18. However, plaintiffs persist in their claim that the affirmation provisions on their face and as applied,

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[9] The Commission stated:

> [W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly. . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act. 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price.

Affidavit of the Liquor Commission at 3–4.

[10] For the importance of having definitive indications as to how any particular affirmation will be applied, *see Brown-Forman Distillers v. N.Y. Liquor Auth.*, 106 S. Ct. 2080 (1986), wherein the majority laments that "we have no means of predicting how the [New York] Liquor Authority would" react to an application for a price reduction following posting, and chastizes the dissenters for "indulging [in the] assumption that the Authority will be sensitive to Commerce Clause concerns." *Id.* at 2087, 2086 n.5. The dissent, in turn, expressed the view that the Liquor Authority, like any agency "charged with rectifying questionable applications of necessarily general rules," was entitled to a presumption of constitutionality "consistent with the respect due state administrative organs responsible for the operation of a state law whose constitutionality is challenged. . . ." *Id.* at 2089–90. The ambiguity presented in *Brown-Forman* was avoided by the Commission's ruling. It is to be commended.

> are purely protectionist legislation designed to protect in-state wholesalers and retailers at the expense of out-of-state brewers, wholesalers and retailers. The purpose and effect of the new law is precisely the same as the old law — discouraging purchases of beer by Connecticut residents in the Border Strates by requiring the brewers to offer their products to Connecticut wholesalers at prices which are artificially lower than competition would warrant, or conversely, to artificially raise their prices to Border State wholesalers.

Id. at 19.

Plaintiffs' cross-motion for summary judgment is, thus, bottomed on the unconstitutionality of the amended price affirmation law. Conversely, defendants' motion is based on the claim that the legislation is constitutional.

II. Discussion

A. Summary Judgment Standard

To grant a motion for summary judgment, there can be no "genuine issue as to any material fact" and the moving party must be "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Schwabenbaur u. Board of Educ.*, 667 F.2d 305, 313 (2d Cir. 1981). "The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute." *American Int'l Group, Inc. u. London American Int'l Corp.*, 664 F.2d 348, 351 (2d Cir. 1981), quoting *Heyman u. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975). Moreover, there must be no controversy as to inferences which may be drawn from the facts of record. *Phoenix Sau. & Loan, Inc. u. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967). In determining whether or not there is a genuine factual issue in the case, the court must "resolve all ambiguities and draw all reasonable inferences against the

moving party." *Schwabenbauer*, 667 F.2d at 313; *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). However, one against whom summary judgment is sought cannot rely on factually unsubstantiated conclusory allegations to sustain a claim that questions of fact exist. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552–53 (1986). That both sides have moved for summary judgment "does not mean that the court must grant judgment as a matter of law for one side or the other," *Schwabenbaur*, 667 F.2d at 314, and it is error to "assume that no material facts remain in dispute simply because both parties moved for summary judgment." *In re Citizens Loan & Sav. Co.*, 621 F.2d 911, 913 (8th Cir. 1980) (citation omitted).

B. The Commerce Clause and the Twenty-First Amendment

Judges must not, in the exercise of the judicial function, undertake to second-guess the political judgment of legislators. Quite to the contrary, judges must refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *see also 324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 733–34 (1987). Although courts must determine whether a challenged statute is or is not constitutional — a task concededly involving judgment and interpretation — legislation is presumed constitutional unless clearly shown not to be so. *State v. Warren*, 169 Conn. 207, 217 (1975). Moreover, where a statute permits of two constructions, one valid and the other invalid as unconstitutional, the valid construction should be adopted "even where it is not the obvious one." *Lublin v. Brown*, 168 Conn. 212, 219–20 (1975).

A state's authority to regulate aspects of the liquor industry is greater than other areas of regulation by virtue of the twenty-first amendment. Section 2 of that amendment provides: "The transportation or importation into any State,

Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." Section 2 "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulation are within a state's authority.

> The Twenty-first Amendment thus gives the states broad power to ban, restrict, or otherwise regulate importation and in-state traffic in alcoholic beverages and thereby eliminates some of the otherwise applicable Commerce Clause constraints. For example, a state may prohibit entirely the sale of intoxicating liquors within its borders, *see State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62–63 (1936) although under traditional Commerce Clause limitations it could not ban the sale of other products, *see, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. [514,] 521 [(1935)] (wholesale milk) . . . . Or a state may prohibit local dealers from selling beer manufactured in another state on the ground that the latter state discriminate against beer manufactured in the first state, *see Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939), although it would not be free to impose the same type of restrictions with respect to milk, *see Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); nor could it constitutionally prohibit the exportation of local ground water to another state on the basis that the latter state would forbid exportation of its water to the first state, *see Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Healy I, 692 F.2d at 280-281 (other citations omitted). [11]

However, as *Healy I* states, not even in the area of regulating intoxicating beverages is the authority of a state absolute.[12] The twenty-first amendment "has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Joseph E. Seagrem & Sons v. Hostetter*, 384 U.S. 35, 42 (1966). The commerce clause — though worded as a grant of affirmative power to Congress — has traditionally been interpreted to limit state action which affects economic activities outside its own borders. "In general the Commerce Clause is viewed as intending to promote free trade among the states and to liberate the flow of articles in commerce from the provincialism evident in local regulations." *Healy I*, 692 F.2d at 278.[13] State statutes which directly discriminate against interstate commerce or which favor in-state economic interests over out-of-state interests are per se

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[11] The distinction drawn by the Court of Appeals between milk and liquor may not be quite as sharp following the Supreme Court's decision in *Brown-Forman* in which the Court relied heavily on *Seelig* in overturning New York's affirmation statute.

[12] The Supreme Court is currently divided as to how extensively the twenty-first amendment was intended to authorize state regulation of the liquor industry. *Compare* the opinion of the Court, (Powell, J.), in *324 Liquor Corp.*, 107 S. Ct. at 726 (the "States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution"), *with* the dissent, (O'Connor, J.), *id.* at 730 (endorsing former Justice Black's view "that the Senators who approved the Twenty-first Amendment thought they were returning absolute control over the liquor industry to the States"). *See also Newport v. Iacobucci*, 107 S. Ct. 383 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

[13] From the late nineteenth century until the New Deal, the commerce clause was used — often in conjunction with the due process clause of the fourteenth amendment — to invalidate numerous state regulatory measures. *See, e.g., Seelig*. From 1945 to 1970 the commerce clause was invoked rarely — and the due process clause hardly at all — to strike down economic legislation. In the last decade, the Supreme Court increasingly entertained objections to state statutes based on the burdens imposed on interstate commerce. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

unconstitutional. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Bacchus Imports*. Even where a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it will not be sustained if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citations omitted). "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084.

Thus, "the Twenty-first Amendment and the Commerce Clause 'each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.'" *Id.* at 2087, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *see Midcal*, 445 U.S. at 109 (what is required in this area is a "pragmatic effort to harmonize state and federal powers").

C. **The Affirmation Issue**

Against the foregoing general principles, the cases in the field of liquor affirmation must be examined for their application to the legislation adopted by Connecticut.

In *Seagram*, the Supreme Court unanimously upheld a New York requirement that alcoholic beverage brand owners affirm that the price charged to New York wholesalers was "no higher than the lowest price" than was charged anywhere in the country in the *preceding* month.

> The mere fact that § 9 [the price affirmation section] is geared to appellant's pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York

> may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. . . . It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

Seagram, 384 U.S. at 43, quoting Osborn v. Ozlin, 310 U.S. 53, 62 (1940). Although the Court thus rejected the argument that the New York affirmation law was facially invalid, it made clear that future decisions would depend on the facts of each case. *See id.* at 52 ("it is possible that specific future application of [the statute] may engender concrete applications of constitutional dimension").

Indeed, the next challenge to New York's affirmation law, the challenge was successful. In *Brown-Forman*, the Court declared unconstitutional an amended version which required distillers to affirm that the price charged to New York wholesalers "is no higher than the lowest price at which such item of liquor *will be* sold by such [distiller] to any wholesaler anywhere" in the nation. Alcoholic Beverage Control Law § 101-b(3)(d) (McKinney Supp. 1986) (emphasis added). The Court stressed the fact that, by requiring such an affirmation, New York made it illegal for distillers to reduce prices in other states during the following month in which the posted New York prices were in effect. By so doing, New York had " 'project[ed] its legislation' into other States" in violation of the commerce clause. *Brown-Forman*, 106 S. Ct. at 2087, quoting *Seelig*, 294 U.S. at 52.

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other

> States surrender whatever competitive advantages they may possess. Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States. . . . The mere fact that the effects of New York's [affirmation law] are triggered only by sales of liquor within the State of New York . . . does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state.

Id. at 2085.

The Court distinguished *Seagram* on the ground that the earlier version of New York's affirmation law was *retrospective* in nature — requiring only that the affirmed price be no higher than the lowest price at which sales were made during the *previous* month — whereas the amended version was *prospective*. Thus, the earlier version regulated the price charged in New York in relation to prices charged outside the state, whereas the later version limited prices charged outside the state for the month after the price was posted in New York. This was precisely the distinction relied on by the Second Circuit in *Healy I* in striking down Connecticut's original beer price affirmation law (which also had a prospective reach).

> The New York statute [in *Seagram*] differed significantly from the Connecticut statute, because, unlike Connecticut's [original] beer price affirmation provisions which control brewers' *future* conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.

692 F.2d at 283.

Brown-Forman explicitly embraced *Healy I*:

> We agree with . . . the *Healy* court that a "prospective" statute such as Connecticut's [original] beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. . . . While New York may regulate the sale of liquor within its borders, and may seek lower prices for its residents [as it did in *Seagram*], it may not "project its legislation into [other States] by regulating the price to be paid" for liquor in those States.

Id. at 2086 (citations omitted).

The 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous. Brewers must affirm that the price charged at 10:00 a.m. on the sixth day of each month to Connecticut wholesalers is no higher — *at that moment* — than the lowest price then being charged to wholesalers in the border states. The posted price must remain in effect in Connecticut for one month. Nonetheless, brewers and importers are free to raise or lower their prices in the border states. Of course a brewer or importer is still obliged to factor into its business decisions the recognition that its lowest price in any of the border states on the day of posting must be offered to Connecticut wholesalers for the ensuing month. The issue in the instant case, therefore, is whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause.

There is little doubt that Connecticut's present affirmation law would be constitutional under *Seagram*. The difficulty lies in assessing *Seagram's* precedent vitality. *Brown-Forman* decided only the questions presented in that case and left open the constitutionality of affirmation statutes less oppressive than the prospective legislation there struck down. Although the Court appeared to emphasize that the different result from that in *Seagram* resulted from the difference between retrospective and prospective affirmation laws, the Court qualified its analysis:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

Id. at 2087 n.6. Justice Blackmun, who joined the opinion of the Court (except for footnote 6), filed a concurrence to state that he "would go further and overrule" *Seagram*, which he characterized as "a relic of the past":

> [*Seagram*] was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram* . . . . Either type, despite one's best efforts at fine tuning, operates

> to affect out-of-state transactions and violates the Commerce Clause. Our failure to overrule *Seagram* now merely preserves uncertainty and will breed or necessitate further litigation. We should face reality and overrule *Seagram*.

Id. at 2088.

Despite the "uncertainty" referred to by Justice Blackmun, Connecticut's beer affirmation statute is here held to be constitutional. Such a finding comports with the presumption of validity to which all economic regulatory legislation is entitled. Such a finding comports, also, with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states. And it accords with dicta in *Healy I* to the effect that "[g]iven the latitude allowed a state under the Twenty-first Amendment . . . *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states . . . leaving those out-of-state prices unregulated by Connecticut." *Seagram*, 692 F.2d at 283–284.

Above all, such a finding is consistent with the Supreme Court's interpretation of the commerce clause as it has evolved to date. Whatever the future fate of *Seagram*, no other Justice joined Blackmun's call in *Brown-Forman* for its demise; it remains to be considered by lower courts, unless and until it is formally overruled. *Cf. Healy I*, 532 F. Supp. at 1325 n.48 (rejecting USBA's argument that *Seagram* must be relegated to a "different era" of constitutional adjudication). Under *Seagram*, Connecticut's affirmation statute is facially valid because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. Although plaintiffs cite

numerous excerpts from the legislative debates over beer price affirmation to show that many voted for the measure intended it to protect local wholesalers and retailers from the competition of wholesalers and retailers in the border states,[14] the price flexibility provided by the latest amendments destroys much, if not all, of the force of their argument. Moreover, Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices. "The legislative intent to secure 'fairer' or 'more equal' competition can hardly be characterized as 'protectionist' within the meaning of the Commerce Clause." *Healy I*, 532 F. Supp. at 1323.

In addition to being facially valid, the statute also passes muster under the second of the two-tier standard enunciated in *Pike*. "[T]he critical consideration" — under either test — "is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084. Crediting USBA's assertions that some business of Connecticut residents previously going to border state retailers will shift to Connecticut retailers, and that some "artificially" high prices (in the border states) and/or some "artificially" low prices (in Connecticut) will result from beer price affirmation even as amended, the "mere fact" that an affirmation law "is geared to . . . pricing policies in other States is not sufficient to invalidate the statute" because a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country," *Seagram*, 384 U.S. at 43, and because a "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). Any state economic regulatory legislation exerts some impact on interstate commerce and courts should be cautious in striking down such legislation merely because "the faintest

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[14]On this point, see the district court opinion in *Healy I*, 532 F. Supp. at 1318 n.16, 1323 n.41.

economic ripples begin to flow outside state borders . . . ." *Brown-Forman*, 106 S. Ct. at 2091 n.8 (Stevens, J., dissenting). The disincentive to Connecticut consumers to buy outside the state, not shown to be of more than minor economic significance, and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut are not an excessive intrusion on commerce. Because Connecticut's statute operates evenhandedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits.

Finally, it is worth noting that the commerce clause, though often construed as restrictive of a state's authority, does not prohibit anything. It is a positive grant of authority to Congress to regulate matters of national economic importance. Since Connecticut is only one of over thirty states with affirmation laws, the problems posed by "overlapping and potentially conflicting affirmation statutes," *id.* at 2088 (Blackmun, J., concurring)[15] are appropriate subjects for Congress to address — consistent, of course, with the limits imposed on both Congress and courts by the twenty-first amendment. To date, Congress has not done so. Plaintiffs may press their case in the national legislative arena, a better use of the powers created by the Constitution than to have this court strike down state regulatory legislation with a legitimate local purpose that does not impermissibly burden interstate commerce.

Accordingly, defendants' motion for summary judgment is granted.

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[15]Statutes, such as Connecticut's, enacted in several states, though overlapping, are unlikely to conflict, but, as pointed to prices at the lowest common denominator, are more likely to produce harmony, i.e., uniform low prices.

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of September, 1987.

/s/ Peter C. Dorsey

Peter C. Dorsey
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, ET AL.	)	
VS.	)	CIVIL H-84-816 PCD
JOHN T. HEALY, ET AL.	)	

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Cross-Motions for Summary Judgment, granting the defendants motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut, this 15th day of September 1987.

KEVIN F. ROWE,
Clerk

By Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE BEER INSTITUTE, et al Plaintiffs	:	Docket No. 87-7880
v.	:	
JOHN F. HEALY, et al Defendants	:	July 5, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Wine and Spirits Wholesalers of Connecticut, Inc., as an association and on behalf of its following members selling alcoholic liquor in the State of Connecticut: Johnny Barton, Inc.; the Brescome Distributors Corporation; Connecticut Distributors, Inc.; Eder Bros., Inc.; Gallo Wine Merchants, Inc.; Allan S. Goodman, Inc.; and Hartley & Parker Limited, Inc., Intervenor Defendants in the aforementioned action, hereby appeal to the Supreme Court of the United States from the final order reversing the District Court entered in this action on June 13, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254 (2).

Dated at Hartford, Connecticut, this 5th day of July, 1988.

INTERVENOR-DEFENDANTS
WINE AND SPIRITS WHOLESALERS
OF CONNECTICUT, INC.

William A. Wechsler
Bailey and Wechsler
66 Forest Street
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PROOF OF SERVICE

This is to certify that the undersigned served one copy of the foregoing Notice of Appeal upon each other party separately represented by depositing same this 5th day of July, 1988, at the U.S. Post Office in Hartford, Connecticut, with first-class postage prepaid addressed to the below listed counsel of record:

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APPENDIX E

Substitute Senate Bill No. 351

PUBLIC ACT NO. 84-332

AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (c) of section 30-63 of the general statutes is repealed and the following is substituted in lieu thereof:

(c) Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, ON A MONTHLY BASIS, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend his posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended

price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met.

Sec. 2. Section 30-63a of the general statutes is amended by adding subsection (c) as follows:

(NEW) (c) No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale, to a wholesaler permittee any brand of wine as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported, or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia or to any state, including an agency of such state, which owns and operates retail liquor outlets.

Sec. 3. Section 30-63b of the general statutes is repealed and the following is substituted in lieu thereof:

(a) At the time of posting of the bottle, can and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of such alcohol and spirits posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of alcoholic liquor is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia, or

to any state or agency of a state which owns and operates retail liquor outlets. [, at any time during the calendar month covered by such posting.]

(b) At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [, at any time during the calendar month covered by such posting.]

(c) AT THE TIME OF POSTING OF THE BOTTLE, CAN AND CASE PRICE REQUIRED BY SECTION 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, EVERY HOLDER OF A MANUFACTURER OR OUT-OF-STATE SHIPPER'S PERMIT, OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER, SHALL FILE WITH THE DEPARTMENT OF LIQUOR CONTROL A WRITTEN AFFIRMATION UNDER OATH BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER OF EACH BRAND OF WINE POSTED CERTIFYING THAT AT THE TIME OF POSTING THE BOTTLE, CAN OR CASE PRICE TO THE WHOLESALER PERMITTEES IS NO HIGHER THAN THE LOWEST PRICE AT WHICH EACH SUCH ITEM OF WINE IS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS.

[(c)] (d) By and with the consent of the department a manufacturer or out-of-state shipper may file with the department the affirmation required by this section once and may certify thereon that such affirmation shall remain in full force and effect until rescinded by said manufacturer or out-of-state shipper; such rescission to be effective at the beginning of a new posting period required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, and such notice of rescission shall be given at least fifteen days before its effective date. In the event of the rescission of an affirmation such manufacturer or out-of-state shipper shall not ship, transport, deliver, sell or offer to sell to a wholesaler permittee until a new affirmation is filed with said department in accordance with the provisions of this section.

(e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.

Sec. 4. Section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(a) In determining the lowest price for which any item of such alcohol and spirits is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any other state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any

such wholesaler in another state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible.

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

(c) IN DETERMINING THE LOWEST PRICE FOR WHICH ANY ITEM OF WINE IS OR WAS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED AT THE TIME OF POSTING, BY ANY MANUFACTURER OR OUT-OF-STATE SHIPPER TO A WHOLESALER IN ANY OTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, APPROPRIATE REDUCTIONS

WILL BE MADE FOR ALL DISCOUNTS, REBATES, FREE GOODS, ALLOWANCES AND OTHER INDUCEMENTS OF ANY KIND WHATSOEVER, INCLUDING DEPLETION AND FLOOR-STOCK ALLOWANCES, OFFERED OR GIVEN TO ANY SUCH WHOLESALER IN ANOTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, PROVIDED DIFFERENTIALS IN PRICE WHICH MAKE ONLY DUE ALLOWANCE FOR DIFFERENCES IN STATE TAXES AND FEES AND FOR THE ACTUAL COST OF DELIVERY ARE PERMISSIBLE.

Certified as correct by

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Legislative Commissioner.

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Clerk of the Senate.

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Clerk of the House.

Approved _____, 1984

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Governor, State of Connecticut.

Substitute Senate Bill No. 429

PUBLIC ACT NO. 84-432

AN ACT CONCERNING PRICES AND APPOINTMENT OF DISTRIBUTORSHIPS FOR BEER WHOLESALERS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (b) of section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "ACTUAL COST OF DELIVERY" SHALL MEAN THOSE EXPENSES INCURRED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER IN DELIVERING THE ITEM OF BEER TO THE WHOLESALER FROM THE POINT OF ORIGIN TO THE POINT OF DESTINATION, THE TERM "POINT OF ORIGIN" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION FROM WHICH THE WHOLESALER HAS BEEN CHARGED BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER FOR COSTS OF TRANSPORTATION, NOTWITHSTANDING THE FACT THAT THE ITEM OF BEER MAY HAVE BEEN MANUFACTURED OR BOTTLED AT, OR SHIPPED FROM, A

DIFFERENT GEOGRAPHIC LOCATION, THE TERM "POINT OF DESTINATION" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION AT WHICH THE WHOLESALER TAKES DELIVERY OF THE ITEM OF BEER, THE TERM "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes AND PACKAGES, approved by the department of liquor control, or his brand which he offers to any wholesaler in any state bordering this state.

Sec. 2. Subsection (a) of section 30-17 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) (1) A wholesaler permit shall allow the bottling of alcoholic liquor and the wholesale sale of alcoholic liquor to permittees in this state and without the state, as may be permitted by law, and the sale of alcoholic liquors to vessels engaged in coastwise or foreign commerce, and the sale of alcohol and alcoholic liquor for industrial purposes to nonpermittees, such sales to be made in accordance with the regulations prescribed by the department of liquor control, and the sale of alcohol and alcoholic liquor for medicinal purposes to hospitals and charitable institutions and to religious organizations for sacramental purposes and the receipt from out-of-state shippers of multiple packages of still wines and sparkling wines. The holder of a wholesaler permit may apply for and shall thereupon receive an out-of-state shipper's permit for direct importation from abroad of alcoholic liquors manufactured outside the United States and an out-of-state shipper's permit for direct importation from abroad of beer manufactured outside the United States.

(2) When a holder of a wholesale permit has had the distributorship of any alcohol, beer, spirits or wine product of a manufacturer or out-of-state shipper or their successors or assigns for six months or more, such distributorship may be terminated or its geographic territory diminished upon (A) the execution of a written stipulation by the wholesaler and manufacturer or out-of-state shipper or their successors or assigns agreeing to the change and the approval of such change by the department of liquor control; or (B) the sending of a written notice by registered mail, return receipt requested, by the manufacturer or out-of-state shipper or their successors or assigns to the wholesaler, a copy of which notice has been sent simultaneously by registered mail, return receipt requested, to the department of liquor control. No such termination or diminishment shall become effective except for just and sufficient cause, provided such cause shall be set forth in such notice and the department of liquor control shall determine, after hearing, that just and sufficient cause exists. If an emergency occurs, caused by the wholesaler, prior to such hearing, which threatens the manufacturer's or out-of-state shipper's or their successor's or assign's products or otherwise endangers the business of the manufacturer or out-of-state shipper or their successors or assigns and said emergency is established to the satisfaction of the department of liquor control, the department may temporarily suspend such wholesaler permit or take whatever reasonable action the department deems advisable to provide for such emergency and the department may continue such temporary action until its decision after a full hearing. The department of liquor control shall render its decision with reasonable promptness following such hearing. Notwithstanding the aforesaid, a manufacturer or out-of-state shipper or their successors or assigns may appoint one or more additional wholesalers as the distributor for an alcohol, [beer,] spirits or wine product within such territory, provided [with regard to alcohol, spirits or wine products] such appointment shall not be effective until six months [, and with regard to beer products one year,] from the date such manufacturer or out-of-state shipper or their successors or assigns shall set forth such intention in written

notice to the existing wholesaler by registered mail, return receipt requested, with a copy of such notice simultaneously sent by registered mail, return receipt requested, to the department of liquor control. FOR JUST AND SUFFICIENT CAUSE, A MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS MAY APPOINT ONE OR MORE ADDITIONAL WHOLESALERS AS THE DISTRIBUTOR FOR A BEER PRODUCT WITHIN SUCH TERRITORY PROVIDED SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS SHALL SET FORTH SUCH INTENTION AND CAUSE IN WRITTEN NOTICE TO THE EXISTING WHOLESALER BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, WITH A COPY OF SUCH NOTICE SIMULTANEOUSLY SENT BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, TO THE DEPARTMENT OF LIQUOR CONTROL. For the purposes of this section, just and sufficient cause means the existence of circumstances which, in the opinion of a reasonable person considering all of the equities of both the wholesaler and the manufacturer or out-of-state shipper or their successors or assigns, warrants a termination or a diminishment of a distributorship as the case may be.

(3) Nothing contained herein shall be construed to interfere with the authority of the department of liquor control to retain or adopt reasonable regulations concerning the termination or diminishing of a distributorship held by a wholesaler for less than six months.

(4) ALL HEARINGS HELD HEREUNDER SHALL BE HELD IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 54.

Sec. 3. This act shall take effect from its passage.

Certified as correct by

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Legislative Commissioner.

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Clerk of the Senate.

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Clerk of the House.

Approved _____, 1984

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Governor, State of Connecticut.

APPENDIX F

Sec. 30-6-B4a. Time of posting

(a) Price schedules filed on or before the sixth day of January pursuant to Section 30-6-B4 (a) shall be deemed posted on the sixth day of January at 10:00 a.m. Eastern Standard Time. If the sixth day of January is a Saturday, Sunday or legal holiday, price schedules shall be filed on the next business day and shall be deemed posted on such next business day at 10:00 a.m. Eastern Standard Time.

(b) In accordance with Section 30-6-B4 (c), such price schedule shall be deemed re-posted, unless a timely supplemental price schedule is filed, on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any succeeding month is a Saturday, Sunday or legal holiday, the price schedule shall be deemed reposted at 10:00 a.m. Eastern Standard Time on the next business day.

(c) Supplemental price schedules filed on the sixth day of any month shall be deemed posted at 10:00 a.m. Eastern Standard Time on that day and re-posted on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any month is a Saturday, Sunday or legal holiday, such supplemental price schedule shall be filed on the next business day, and shall be deemed posted or reposted, as the case may be, at 10:00 a.m. Eastern Standard Time, on such day.

(d) Any price schedule or supplemental price schedule filed late shall be ineffective for that month and shall be applicable for the next filing deadline. Any price schedule or supplemental price schedule filed early shall be applicable for the pending filing deadline.

(Effective October 21, 1985)